

STATE OF MICHIGAN
IN THE SUPREME COURT

KENNETH HENES SPECIAL PROJECTS,
PROCUREMENT, MARKETING AND
CONSULTING CORPORATION,

Plaintiff-Appellee,

V.

CONTINENTAL BIOMASS INDUSTRIES,
INCORPORATED,

Defendant-Appellant.

Case No. 120110

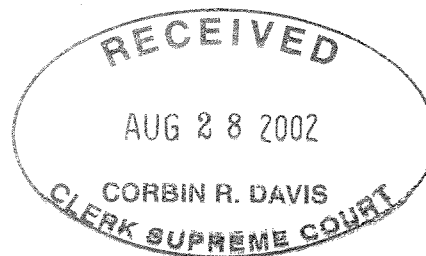
U. S. Court of Appeals for the
Sixth Circuit Docket No. 00-1267

Appeal from the U.S. District Court
for the Eastern District of Michigan
No. 98-CV-72966-DT
Honorable Gerald E. Rosen

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**DEFENDANT-APPELLANT CONTINENTAL BIOMASS
INDUSTRIES, INC.'S REPLY BRIEF**



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ARGUMENT I

Plaintiff's arguments ignore that legal terms-of-art such as "intentionally" are subject to different rules of statutory construction, as reflected in this Court's previous decisions as well as Michigan statute.

In its brief, plaintiff urges this Court to apply the supposed "common" meaning of the phrase "intentionally failed to pay." Plaintiff's argument ignores the fact that because "intentionally" is a legal term-of-art, Michigan law dictates that it be interpreted according to the unique meaning that it has acquired in the law, rather than the "common" meaning that plaintiff advocates.

MCL 8.3a dictates that technical words and phrases that have acquired a peculiar and appropriate meaning in the law must be interpreted according to that meaning:

Sec 3a All words and phrases shall be construed and understood according to the common and approved usage of the language; *but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.*

[Emphasis added.]

This Court's decisions reflect this rule. For instance, in *People v Law*, 459 Mich 419 (1999), this Court observed that legal terms-of-art used in a statute are to be construed and understood according to the peculiar and appropriate meaning that they have acquired in the law:

A legal term of art is a technical word or phrase that has acquired a particular and appropriate meaning in the law. It is, in a statute, to be construed and understood according to such meaning.

[*Id* at 425 n8.]

Thus, in *Law*, the Court construed the term "restitution," as used in Michigan's Crime Victim's Rights Act, to include interest, because in previous Michigan opinions the term had been construed to encompass interest. See *id* at 425.

Likewise, in *People v Gahan*, 456 Mich 264 (1997), this Court interpreted the term “course of conduct” according to the meaning it had acquired in the common law:

This phrase having acquired a unique meaning at common law, the meaning is carried over to the interpretation of the subsequent statute dealing with the same subject matter absent any direction to the contrary by the Legislature.

[*Id* at 272.]

Numerous opinions from this Court have recognized this fundamental rule of construction. See, e.g., *People v Reeves*, 448 Mich 1, 8 (1995) (observing that “[i]n enacting statutes, the Legislature recognizes that courts will apply common-law rules to resolve matters that are not specifically addressed in the statutory provision,” and that words and phrases that have acquired a unique meaning at common law are interpreted as having the same meaning when used in statutes dealing with the same subject matter); *Massey v Mandell*, 462 Mich 375, 386 (2000) (Corrigan, J., concurring) (observing that under MCLA 8.3a legal terms of art must be understood according to their peculiar and appropriate meaning under MCLA 8.3a).

It is therefore clear that the term “intentionally,” as used in the SRCA, must be construed according to its peculiar and unique meaning in *the law*, not according to some so-called “common” or lay meaning of the word.

Michigan precedent shows that the term “intentional” connotes conduct that is egregious -- at least rising to the level of bad faith. Michigan courts have traditionally looked for “[w]illful and wanton misconduct” in defining an act as “intentional.” See, e.g., *Hill v Saginaw*, 155 Mich App 161, 170 (1986). And, for example, the common-law tort of “intentional infliction of emotional distress” has always been characterized by “extreme and outrageous” conduct. See *Roberts v Auto Owners Ins Co*, 422 Mich 594, 602 (1985).

When the Michigan Legislature inserted the term “intentionally” into the SRCA -- in response to Governor Engler’s veto of a version omitting a heightened state-of-mind threshold for recovering penalty damages -- it was using a term-of-art with a longstanding connotation of malicious or bad-faith conduct. MCL 8.3a, and this Court’s precedent, dictate that the term “intentionally” be interpreted according to the peculiar and appropriate meaning it has acquired in the law -- not based on a lay or “common” dictionary definition.

ARGUMENT II

Plaintiff’s proposed construction of the SRCA’s “intentionally failed to pay” provision ignores the context in which the critical term “intentionally” appears -- it is a state-of-mind threshold in a provision imposing punitive damages.

When construing the meaning of the term “intentionally,” it is important that the Court be ever-mindful of the context in which the term appears: a statutory provision imposing punitive damages. This context confirms that the term “intentionally” represents a heightened state-of-mind threshold commensurate with that traditionally required for a punitive-damages recovery.

The “contextual understanding” of statutes is generally grounded in the doctrine of *noscitur a sociis*, which translates to: “It is known from its associates.” *Brown v Genesee County Bd of Comm’rs (After Remand)* 464 Mich 430, 437 (2001). “This doctrine stands for the principle that a word or phrase is given meaning by its context or setting.” *Id* (quoting *Tyler v Livonia Schools*, 459 Mich 382, 390-391 (1999)). Thus, in Michigan, courts “ascertain the meaning of a word by examining it carefully in its proper context in the statute.” *Nippa v Botsford General Hosp*, ___ Mich App ___, ___ (2002) (2002 Mich App LEXIS 898).

In the present case, the term “intentionally” must be read in context -- as the state-of-mind threshold for recovering punitive damages. Contrary to plaintiff’s erroneous claims, it must strictly construed in favor of the person being penalized, *Attorney General v Biewer Co*, 140 Mich

App 1, 9; 363 NW2d 712, 716-717 (1985), and consistent with Michigan's traditional requirement that punitive damages may only be recovered where there is a showing of bad faith.

RELIEF REQUESTED

Defendant-Appellant Continental Biomass Industries, Inc. asks this Court to issue an opinion declaring that in order for a plaintiff to recover a double-damages penalty under the SRCA, he or she must satisfy a subjective bad-faith standard requiring proof that the defendant actually knew that the disputed commissions were owed, but nevertheless refused to pay them. The opinion should reject plaintiff's argument that even good-faith disputes concerning an obligation to pay commissions can give rise to punitive damages.

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Dated: August 26, 2002
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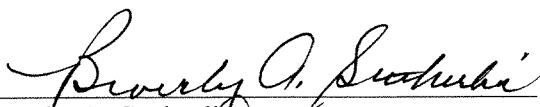
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CERTIFICATE OF SERVICE

Beverly A. Sutherlin says that on the 27th day of August, 2002, she served two copies of *Defendant-Appellant Continental Biomass Industries, Inc.'s Reply Brief* on Randall J. Gillary, 201 West Big Beaver Road, Suite 1020, Troy MI 48084 by placing same in sealed envelope(s) with postage fully prepaid thereon, and depositing same in a United States Mail receptacle.

I hereby declare that the statement above is true to the best of my knowledge, information and belief.


Beverly A. Sutherlin